

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

Docket No. 03-E-0106

In the Matter of the Liquidation of
The Home Insurance Company

**59 MAIDEN LANE ASSOCIATES'
OPPOSITION TO LIQUIDATOR'S MOTION FOR
APPROVAL OF NEW YORK TAX SETTLEMENT**

59 Maiden Lane Associates ("Owner"), by its attorneys, Piper Rudnick LLP and Shaheen & Gordon, P.A., hereby opposes the motion by Roger A. Sevigny, Insurance Commissioner of the State of New Hampshire, as Liquidator (the "Liquidator") of The Home Insurance Company ("The Home") for an order permitting the Liquidator to enter into a proposed settlement (the "Proposed Settlement") of tax certiorari proceedings (each, a "Tax Proceeding") between The Home and The Tax Commission of the City of New York and The Department of Finance (the "City of New York") with respect to that certain parcel of improved real property located at 59 Maiden Lane, New York, New York (the "Premises" or "59 Maiden Lane") for tax years 1991/92 through 1995/96. As reasons therefor, Owner states as follows:

1. The Liquidator is a party to a written Settlement Agreement (defined hereinbelow) -- approved by the United States Bankruptcy Court -- which requires The Liquidator to obtain Owner's consent as a condition to entering into any settlement of any Tax Proceeding. The Liquidator is looking have this Court sanction the Liquidator's breach of the Settlement Agreement (in addition to the covenant of good faith and fair dealing implied therein) by permitting the Liquidator to enter into the Proposed Settlement in the face of Owner's explicit refusal to consent thereto. As demonstrated below, the Proposed Settlement adversely impacts Owner's interests and, therefore, Owner's refusal to consent to the Proposed Settlement was not

unreasonably withheld. Consequently, and for the reasons set forth below, the Liquidator's motion for authority to enter into the Proposed Settlement should be denied.

A. Background

2. 59 Maiden Lane Associates is the owner of 59 Maiden Lane, having purchased the Premises in 1998 from Olympia and York Maiden Lane Company ("O&Y"). The Home has been a tenant in the Premises since 1981. In 1996, The Home commenced an action (the "O&Y Action") in the New York Supreme Court, New York County, against O&Y (and other defendants) for rent overcharges and for damages resulting from O&Y's refusal to obtain relief on tax certiorari proceedings pending before the New York Supreme Court (New York County), which relief would inure to The Home's benefit. (Affidavit of William E. Banfield, sworn to February 26, 2004 (the "Banfield Aff."), ¶ 2.)

3. The O&Y Action was settled in accordance with that certain Settlement Agreement made and entered into as of December 22, 1997 (the "Settlement Agreement"), by and between, *inter alia*, The Home and Mitchell E. Rudin, as receiver for O&Y, Marine Midland Bank, as successor Indenture Trustee, and Risk Enterprise Management Limited. In and by the Settlement Agreement, which was approved by the United States Bankruptcy Court, it was agreed that The Home would "have control over the prosecution of any tax certiorari proceedings pending with respect to taxes assessed on the Premises for the tax years ending June 30, 1996." (Settlement Agreement §7, at p.5.) (Banfield Aff. ¶ 4, Exhibit A.)

4. Because the resolution of tax proceedings in specific years may impact tax assessments or tax proceedings for subsequent years -- due to the manner in which taxes are assessed and computed (as explained in greater detail below) -- The Home was required, under the terms of the Settlement Agreement, to consult with Owner (now 59 Maiden Lane Associates) of the Premises in connection with any action to be taken in any of the Tax Proceedings and to

obtain Owner's written consent prior to entering into any settlement of any Tax Proceeding. To this end, section 7(a) of the Settlement Agreement provides, in pertinent part, as follows (emphasis added):

Tax Certiorari Proceedings. Home shall have control over the prosecution of any tax certiorari proceedings pending with respect to taxes assessed on the Premises for the tax years ending June 30, 1996 ("Tax Proceedings"). . . . Home shall coordinate fully and consult frequently with the Owner in connection with any action taken or proposed to be taken in any such Tax Proceeding. The Owner may retain independent counsel who, after having given written notice to Home of his or her retention by the Owner, shall be given notice of and be invited to attend all meetings with representatives of the City of New York relating to any Tax Proceedings, and any administrative or judicial hearings relating to any Tax Proceedings. . . . **Home shall not enter into any settlement of any Tax Proceedings without the prior written consent of the Owner, which consent shall not be unreasonably withheld.**

(Banfield Aff. ¶ 5, Exhibit A.)

5. Here, the Liquidator has breached the Settlement Agreement by failing to give to Owner notice of all meetings with representatives of the City of New York and any judicial hearings -- including those conferences before Justice Schoenfeld of the New York Supreme Court. Thus, Owner was deprived of the opportunity to participate meaningfully in settlement negotiations and protect its interest in the Tax Proceedings for the immediately following years -- as provided in the Settlement Agreement. Because the Proposed Settlement -- negotiated without Owner's participation, input, or consent -- adversely impacts Owner, Owner has refused to consent to the Proposed Settlement. Accordingly, under the Settlement Agreement, the Liquidator may not consummate the Proposed Settlement of the Tax Proceedings.

B. Overview of New York City Tax Assessments

6. Since tax year 1981/82, New York City has published two real property tax assessments: an actual assessment and a transitional assessment. Taxes are imposed on the lower of the two assessments (referred to as the “taxable assessment”). (Banfield Aff. ¶ 7.)

7. The actual assessment represents the New York City Finance Department’s opinion of present market value, as multiplied by the applicable assessment ratio. For properties such as 59 Maiden Lane, which is classified as a Class Four property (non-residential, income-producing property), the assessment ratio is forty-five percent (45%). For example, if the New York City Finance Department determines the value of 59 Maiden Lane is \$100,000,000 in a particular tax year, the actual assessment in that tax year will be \$45,000,000 (\$100,000,000 multiplied by 0.45). (Banfield Aff. ¶ 8.)

8. The transitional assessment (representing changes over time to the actual assessment) is computed by “phasing in” (over a five-year period) all “equalization” changes to the actual assessment and adding or subtracting any “physical” changes in value. An “equalization” change is simply the amount by which the actual assessment increases or decreases from the previous year (depending upon whether the tax assessor has valued the property higher or lower than the previous year). “Physical” changes usually represent improvements, damage, or demolition. “Physical” changes are not “phased in,” but rather applied fully to the calculation of the transitional assessment for that year. In mathematical terms, the method of computing the transitional assessment can be expressed as follows:

$$TA = PTA \pm \text{equalization} \pm \text{physical}$$

(where TA = Transitional Assessment; and PTA = Previous Transitional Assessment).

(Banfield Aff. ¶ 8.)

9. If a property has not experienced an “equalization” increase (*i.e.*, an increase in assessed valuation) for five consecutive years, the difference between the actual assessment in year #4 and the actual assessment in year #5 is not “phased in,” but rather is treated as if it was a “physical” decrease -- in other words the difference is applied fully to the calculation of the transitional assessment in year #5. This methodology continues for each successive tax year until such time as there is an “equalization” increase. (Banfield Aff. ¶ 10.)

C. The Effect of Tax Certiorari Proceedings

10. An owner may protest the actual assessment determined by the New York City Department of Finance. The transitional assessment may not be challenged because it is a calculated value (representing changes over time to the actual assessment). However, if an actual assessment is reduced by reason of a successful challenge, the transitional assessment for that year and for the succeeding tax years is recalculated (reflecting the reduction in the actual assessment). For example, if the actual assessment is reduced by \$100,000, then the transitional assessment for the challenged year and the four succeeding years is reduced by \$20,000 per year. (Banfield Aff. ¶ 11.)

D. The Proposed Settlement Adversely Impacts Owner

11. The Liquidator has negotiated a Proposed Settlement, which provides for significant reductions in the actual assessment for the Premises in tax years 1991/92 and 1992/93 (reductions of \$63,350,000 and \$56,600,000, respectively), a minimal reduction in the actual assessment in tax year 1993/94 (a reduction of \$2,703,240), and no reduction in the actual assessment in tax years 1994/95 and 1995/96. The Proposed Settlement is summarized in the following charts (the years covered by the Proposed Settlement are denoted with an asterisk):

Year	Existing Assessment Values			Proposed Settlement Assessment Values		
	Actual Assessment	Transitional Assessment	Taxable Assessment	Proposed Actual Assessment	Resulting Transitional Assessment	Resulting Taxable Assessment
1989/90	\$ 95,500,000	\$81,900,000	\$81,900,000	\$ 95,500,000	\$81,900,000	\$81,900,000
1990/91	\$103,600,000	\$87,620,000	\$87,620,000	\$103,600,000	\$87,620,000	\$87,620,000
1991/92*	\$100,800,000	\$92,180,000	\$92,180,000	\$ 37,450,000	\$79,510,000	\$37,450,000
1992/93*	\$ 94,050,000	\$94,990,000	\$94,050,000	\$ 37,450,000	\$71,000,000	\$37,450,000
1993/94*	\$ 82,803,240	\$95,350,648	\$82,803,240	\$ 80,100,000	\$70,820,000	\$70,820,000
1994/95*	\$ 80,100,000	\$92,270,648	\$80,100,000	\$ 80,100,000	\$67,740,000	\$67,740,000
1995/96*	\$ 77,400,000	\$84,870,648	\$77,400,000	\$ 77,400,000	\$62,500,000	\$62,500,000
1996/97	\$ 73,350,000	\$76,680,648	\$73,350,000	\$ 73,350,000	\$69,680,000	\$69,680,000
1997/98	\$ 76,500,000	\$74,520,648	\$74,520,648	\$ 76,500,000	\$77,490,000	\$76,500,000
1998/99	\$ 76,500,000	\$74,610,000	\$74,610,000	\$ 76,500,000	\$76,770,000	\$76,500,000
1999/00	\$ 65,250,000	\$72,990,000	\$65,250,000	\$ 65,250,000	\$73,800,000	\$65,250,000
2000/01	\$ 54,000,000	\$70,560,000	\$54,000,000	\$ 54,000,000	\$70,560,000	\$54,000,000

* tax year covered by the Proposed Settlement

Year	Existing Taxable Assessment	Proposed Settlement Taxable Assessment	Difference
1991/92*	\$92,180,000	\$37,450,000	(\$54,730,000)
1992/93*	\$94,050,000	\$37,450,000	(\$56,600,000)
1993/94*	\$82,803,240	\$70,820,000	(\$11,983,240)
1994/95*	\$80,100,000	\$67,740,000	(\$12,360,000)
1995/96*	\$77,400,000	\$62,500,000	(\$14,900,000)
1996/97	\$73,350,000	\$69,680,000	(\$ 3,670,000)
1997/98	\$74,520,648	\$76,500,000	\$ 1,979,352
1998/99	\$74,610,000	\$76,500,000	\$ 1,890,000
1999/00	\$65,250,000	\$65,250,000	\$ 0
2000/01	\$54,000,000	\$54,000,000	\$ 0

(Banfield Aff. ¶ 12, Exhibit B.)

12. As shown above, in bold, as a result of the significant reduction in the actual assessment for the years 1991/92 and 1992/93, there will be an **increase** in the transitional assessment for the years 1997/98, 1998/99, and 1999/00. This increase in the transitional assessment will produce an increase in the taxable assessment for the years 1997/98 and 1998/99 -- a result adverse to the interests of 59 Maiden Lane Associates and the reason 59 Maiden Lane Associates is withholding its consent to the Proposed Settlement. (Banfield Aff. ¶ 13.)

13. There are two reasons for the increase in the transitional assessment in 1997/98 and 1998/99. First, the transitional assessment increases because it no longer reflects the significant reductions in the actual assessment for the years 1991/92 and 1992/93 -- the five-year period for phasing-in the equalization (*i.e.*, reduction in actual assessment) has expired by

1997/98. Second, the reductions in the actual assessment for 1991/92, 1992/93, and 1993/94 changes the tax history for the Premises from one in which there are six consecutive years of reduced actual assessments (*i.e.*, 1990/91 through 1996/97) -- which causes the equalization in each of years 1995/96 (year #5) and 1996/97 (year #6) to be treated as a “physical” decrease (*i.e.*, the equalization is not “phased-in,” but is applied fully in that tax year to the calculation of the transitional assessment) -- to one in which there are only three consecutive years of reduced actual assessments (*i.e.*, 1994/95 through 1996/97), resulting in no accelerated treatment of the equalization in 1995/96 and 1996/97. The resulting “phase-in” of the equalization produces an increase in the transitional assessment for each of 1997/98 and 1998/99 and, accordingly, an increase in the taxable assessment for those years. (Banfield Aff. ¶ 14, Exhibit C.)

14. Also detrimental to Owner’s interests is the lack of any reduction in the assessed valuation of the Premises during the latter years of the settlement period -- 1994/95 and 1995/96. As a result, when 59 Maiden Lane Associates attempts to litigate (or negotiate a resolution of) its Tax Proceedings for subsequent years, it will be prejudiced as the Court (or New York City) will look at those immediately preceding years as evidence of value. Particularly here, where the Liquidator is proposing to settle Tax Proceedings for 1994/95 and 1995/96, New York City will argue -- as it already has -- that the Liquidator (who controlled the prosecution of the Tax Proceedings for those years) conceded and confirmed the accuracy of the actual assessment for those years -- a point of contention 59 Maiden Lane Associates is unwilling to concede. (Banfield Aff. ¶ 15.)

15. Contrary to the position espoused by the Liquidator, the settlement of tax certiorari proceedings for a particular tax year (or tax years) does impact tax certiorari proceedings in subsequent years. For example, in Bass v. Tax Commission of the City of New York, 179 A.D.2d 387, 578 N.Y.S.2d 158 (1st Dep’t 1992), the Supreme Court, Appellate

Division, First Department, affirmed the trial court's reduction of the assessment for the subject property (One New York Plaza -- a 50-story commercial office building located in lower Manhattan) for the tax years 1984/85 through 1989/90, where the trial court considered a the assessment for 1983/84 -- which was the result of a prior settlement -- "as a benchmark for value." In Bass, the trial court found the 1983/84 assessment was an appropriate benchmark because "there was a consensus as to the market value and tax value of the property." Because the New York Supreme Court may consider the Liquidator's settlement of tax years 1994/95 and 1995/96 as a "benchmark for value," Owner will be prejudiced in the prosecution of Tax Proceedings in subsequent years. (For the Court's convenience, copies of the Bass decisions -- both appellate and trial level -- are submitted herewith.) Exhibit B.

16. Moreover, any imposition (additional taxes due and owing as a result of an increase in the taxable assessment -- such as that which will occur in 1997/98 and 1998/99 under the Proposed Settlement) becomes, in accordance with New York law, a charge against, and a lien upon, the Premises (the imposition is not considered to be *in personam*, chargeable to the then-owner of the Premises). Such tax liens, which are afforded super-priority (ahead of any mortgages placed on the Premises), are subject to foreclosure by New York City. 59 Maiden Lane Associates, as the owner of the Premises, has an undeniable interest in keeping the property free from unwanted and unwarranted tax liens which could be the subject of possible foreclosure by the City of New York. Moreover, the filing of liens against the Premises will constitute a default under any mortgage on the Premises, placing Owner in an untenable situation with its lender. (Banfield Aff. ¶ 16.)

17. Finally, the proposed assessed valuations for 1991/92 and 1992/93 were structured with no regard to the actual value of the Premises. The Proposed Settlement for 1991/92 and 1992/93, in which the actual assessment for those years would be reduced to

\$37,450,000, contemplates the actual value of the Premises was a mere \$83,222,222. This is completely out of line with the City's actual valuation of the Premises in the previous year, 1990/91 (valuation of \$230,222,222) and in the immediately following years, 1993/94 through 1995/96 (valuation of between \$172,000,000 and \$178,000,000). For all of the foregoing reasons, Owner -- by letters dated December 11, 2003 and December 19, 2003, respectively -- refused to consent to the Proposed Settlement.¹ (Banfield Aff. ¶ 17, Exhibit D.)

E. Owner's Refusal to Consent to the Proposed Settlement Was Entirely Reasonable

18. As the Liquidator acknowledges, Owner has not consented to the Proposed Settlement. Nevertheless, the Liquidator, by the filing of the instant motion, seeks to obviate the contractual requirement that it obtain the Owner's consent as a condition to entering into any settlement of the Tax Proceedings. Here, as explained above, the Proposed Settlement adversely impacts Owner—as the Proposed Settlement will (a) cause an increase in taxable assessments for the Premises in years after 1995/96, (b) prejudice Owner's prosecution of Tax Proceedings in years after 1995/96, and (c) have the potential to cause a lien to be filed against the Premises. Thus, Owner was well within its rights to refuse to consent to the Proposed Settlement. (Banfield Aff. ¶ 18.)

19. Under New York law (which governs the interpretation and enforcement of the Settlement Agreement), the standard of "reasonableness" is measured with reference to both "objective" and "subjective" criteria. See Kazarinov v. L.B. Kay Associates, 111 Misc.2d 944, 445 N.Y.S.2d 915 (Sup. Ct. N.Y. Co. 1981); Kruger v. Page Management Co., Inc., 105 Misc.2d 14, 432 N.Y.S.2d 295 (Sup. Ct. N.Y. Co. 1980). By "objective", courts mean standards readily

¹ In addition, by letter dated December 24, 2003, HSBC Bank USA ("HSBC"), as successor Indenture Trustee for the Noteholders of the 10¾% Secured Notes due 1995 of Olympia & York Maiden Lane Finance Corp. ("O&Y"), supported the views expressed in Owner's December 11, 2003 letter and indicated that the Proposed

(footnote continued to next page)

measurable from the point of view of the party whose consent is required. By “subjective” is meant the consenting (or non-consenting) party’s needs, dislikes, personal taste, sensibility, or convenience. Refusals predicated on “subjective” criteria generally result in judicial disapproval.

20. In Santangelo v. New York and Suburban Federal Savings and Loan Association, 106 A.D.2d 273, 482 N.Y.S.2d 1011 (1st Dep’t 1984), the Court held that the refusal of defendant, a federal savings and loan association, to consent to a mortgagor’s request for consent to a transfer of title to the mortgaged property would not be unreasonable where the proposed transaction (for which defendant’s consent was required) was not in the best financial interest of the defendant. As demonstrated above, the Proposed Settlement is not in Owner’s best financial interest. Accordingly, Owner was within its rights, as afforded by the Settlement Agreement, to withhold its consent to the Proposed Settlement.

F. Conclusion

21. In negotiating, drafting, and executing the Settlement Agreement, the parties were aware of the possible negative impact a proposed settlement of tax proceedings could have on the Owner. Thus, Owner’s consent was required as a condition to the Home’s entering into any settlement of any Tax Proceedings.

22. Here, as set forth above, the Liquidator has breached the Settlement Agreement -- it failed to provide notice to Owner and its counsel of meetings with representatives of the City of New York and all administrative and judicial hearings relating to the Tax Proceedings. Thus, Owner was deprived of the opportunity to participate in the negotiation and structuring of any

(footnote continued from previous page)
Settlement negatively impacts the Noteholders' rights under the Settlement Agreement. (Banfield Aff. ¶ 17, Exhibit E.)

resolution of the Tax Proceedings. As a result, the Liquidator has structured a Proposed Settlement which adversely impacts Owner, is contrary to Owner's interest in the Premises, and is prejudicial to Owner's position in tax proceedings for years subsequent to those controlled by the Liquidator. Consequently, as explained herein, Owner has not consented to the Proposed Settlement.

23. Because Owner has not consented, the Liquidator, in accordance with the terms and provisions of the Settlement Agreement, may not enter into the Proposed Settlement. This Court should enforce the Settlement Agreement, as written, and deny the Liquidator's request for authority to enter into the Proposed Settlement.

WHEREFORE, 59 Maiden Lane Associates respectfully requests this Court deny the Liquidator's motion and grant such other and further relief as is just and proper.

Respectfully submitted,

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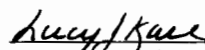
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CERTIFICATE OF SERVICE

I hereby certify that I have on this 27th day of February 2004 forwarded a copy of the within 59 Maiden Lane Associates' Opposition to Liquidators' Motion for Approval of New York Tax Settlement to the following:

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